Uber Technologies, Inc. *and* Lenza H. Mcelrath III.
Case 20–CA–181146

June 11, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On June 13, 2017, Administrative Law Judge Mara-Louise Anzalone issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions with supporting argument, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

The Respondent engages in the operation of a smartphone application and has places of business nationwide, including a facility located in San Francisco, California. Since January 29, 2016, the Respondent has required its software engineers to execute a Dispute Resolution Agreement (Agreement) as a condition of their employment.

In relevant part, the Agreement provides as follows (emphasis in original):

> **How this Agreement Applies:** This Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. This Agreement applies to any dispute arising out of or related to Employee's employment with Uber Technologies, Inc. or one of its affiliates, successor, subsidiaries or parent companies ("Company") or termination of employment and survives after the employment relationship terminates. Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. . . .
>
> Except where this Agreement otherwise provides, this Agreement also applies, without limitation, to disputes regarding the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, or harassment . . . .
>
> Regardless of any other terms of this Agreement, claims may be brought before and remedies awarded by an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board (www.nlrb.gov) . . . .
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> . . . .
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> **Class Action Waiver:** <u>You and the Company agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative basis.</u> There will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action, or as a member in any purported class, collective, representative or private attorney general proceeding, including without limitation pending but not certified class actions ("Class Action Waiver")
> . . . .
>
> Although an Employee will not be retaliated against, disciplined or threatened with discipline as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representative action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver, Collective Action Waiver and Private Attorney General Waiver under the Federal Arbitration Act and seek dismissal of such class, collective or representative actions or claims. . . .

The judge found that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by maintaining its mandatory arbitration agreement because, in her view, "the Agreement would lead a reasonable employee to question his Section 7 rights and, worse still, restrain him from exercising them out of fear that doing so would run afoul of the Agreement." In so concluding, the judge relied on the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which was extant law at the time the judge issued her decision.

On December 12, 2019, the Board issued a Notice to Show Cause why this case should not be remanded to the judge for further proceedings in light of the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017). In *Boeing*, the Board overruled the "reasonably construe" prong of *Lutheran Heritage* and announced a new standard, which applies retroactively for evaluating the lawfulness of a

facially neutral policy. Id., slip op. at 3.[1] The Respondent and the General Counsel each filed a response to the Notice to Show Cause.[2]

II. DISCUSSION

We reverse the judge's decision and find that the Respondent did not violate Section 8(a)(1) of the Act by maintaining its Agreement. The Agreement, when reasonably interpreted, does not potentially interfere with employees' right to file Board charges and participate in Board proceedings.

In *Prime Healthcare Paradise Valley, LLC*, the Board held that "an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful" because "[s]uch an agreement constitutes an explicit prohibition on the exercise of employee rights under the Act." 368 NLRB No. 10, slip op. at 5 (2019). The decision further stated that where an arbitration agreement does not contain such an explicit prohibition but rather is facially neutral, the standard set forth in *Boeing* applies. Id. Under that standard, the Board determines whether the arbitration agreement at issue, "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights." *Boeing*, 365 NLRB No. 154, slip op. at 3.[3] The "when reasonably interpreted" standard is an objective one and looks solely to the wording of the rule, policy, or other provision at issue interpreted from the perspective of an objectively reasonable employee, who does not view every employer policy through the prism of the NLRA. See *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2.

In *Briad Wenco,* 368 NLRB No. 72, the Board addressed the lawfulness of arbitration agreements that require employees to arbitrate federal statutory claims but also include "savings" language that clearly and prominently informs employees that they are free to file charges with the Board. The first paragraph of the arbitration agreements at issue in *Briad Wenco*, when reasonably interpreted, included claims arising under the Act within the scope of their arbitration mandate. Id., slip op. at 1. But the agreements also contained a savings clause providing that "[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including . . . the National Labor Relations Board." Id. The Board found that the savings clause was sufficiently prominent within the agreements, inasmuch as it was referenced in the agreements' second paragraph, listing claims covered, and contained in the eleventh paragraph, which was separated from the first and second paragraphs by only about a page of text. Id., slip op. at 2. Because the savings clause explicitly informed employees that they retained the right to file charges with the Board and access its processes, the Board concluded that employees could not reasonably interpret the agreements to prohibit them from filing Board charges or participating in Board proceedings. Id.

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[1] Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Sec. 7 of the Act. If not, the rule or policy is lawful. If so, the Board evaluates two things: "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." Id. slip op. at 3 (emphasis omitted). In conducting this evaluation, the Board will strike a proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policies, viewing the rule or policy from the employees' perspective. Id. "[T]he Board will delineate three categories" of work rules:

> *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .
>
> *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id., slip op. at 3–4 (emphasis in original). The subdivisions of Category 1 were subsequently redesignated 1(a) and 1(b). See *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 fn. 2 (2019). Placement of a rule or policy in Category 1(a) does not result from balancing NLRA rights and legitimate justifications. See id., slip op. at 2 (for a Category 1(a) rule, "there is no need for the Board to take the next step in *Boeing* of addressing any general or specific legitimate interests justifying the rule"). Other aspects of *Lutheran Heritage* remain intact, including whether a challenged rule or policy explicitly restricts activities protected by Sec. 7. See *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, 369 NLRB No. 70, slip op. at 2 fn. 3 (2020).

[2] In its response to the Notice to Show Cause, the Respondent urges the Board to dismiss the allegation without remand, asserting that its Agreement is comparable to that which the Board found lawful in *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019). The General Counsel does not oppose remand but agrees with the Respondent that if the Board does not remand, it should find the Agreement to be a lawful *Boeing* Category 1(a) rule under *Briad Wenco* and *Private National Mortgage Acceptance Co. LLC*, 368 NLRB No. 126 (2019). Because the only issue in this case is the facial lawfulness of the arbitration agreement—which is already a part of the record before us—we find that a remand is unnecessary.

[3] As *Boeing* itself makes clear, a challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Sec. 7 activity or because the employer failed to eliminate all ambiguities from the rule. See id., slip op. at 9.

Here, similar to the arbitration agreements in *Briad Wenco*, the Agreement requires arbitration of all "disputes regarding the employment relationship," which would include claims arising under the Act. However, this coverage language is immediately followed by a savings clause that explicitly permits employees to bring claims to the Board:

> Regardless of any other terms of this Agreement, claims may be brought before and remedies awarded by an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board (www.nlrb.gov) . . . .

Consistent with *Briad Wenco*, we conclude that this savings clause renders the Agreement lawful under *Boeing*. First, the savings clause is sufficiently prominent. It follows shortly after the sentence providing for arbitration of "all" disputes, necessarily including claims arising under the Act, and therefore is even more prominent than the savings clause that rendered the arbitration agreements lawful in *Briad Wenco*. See 368 NLRB No. 72, slip op. at 2. Second, the savings clause here, like the one in *Briad Wenco*, specifically and affirmatively states that employees may bring claims and charges before the National Labor Relations Board.

Finally, we are unpersuaded that employees would not understand that they retain the right to file unfair labor practice charges with the Board because the Agreement also provides that "claims may be brought before and remedies awarded by an administrative agency *if applicable law permits* access to such an agency notwithstanding the existence of an agreement to arbitrate." (Emphasis added.) Certainly, it is unlikely that rank-and-file employees would know whether the Board is an administrative agency to which they are guaranteed access by "applicable law . . . notwithstanding the existence of an agreement to arbitrate." However, the very next sentence of the Agreement identifies claims brought to the National Labor Relations Board as administrative claims that employees are entitled to bring. Thus, any ambiguity created by the italicized language above is immediately resolved. See *Anderson Enterprises, Inc.*, 369 NLRB No. 70, slip op. at 3–4 (finding substantially similar arbitration agreement to be lawful).[4]

For these reasons, the Agreement cannot be reasonably understood to potentially interfere with employees' access to the Board and its processes. Accordingly, we find that the Agreement is lawful under *Boeing* Category 1(a). *Boeing*, 365 NLRB No. 154, slip op. at 4 (holding that Category 1(a) consists of "rules that are lawful because, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights") (footnote omitted).

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 11, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

_____

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Richard McPalmer, Esq., for the General Counsel.
Alan I. Model, Esq. (Littler Mendelson, PC), for the Respondent.
Lenza McElrath III, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. Upon a charge and amended charge filed by Lenza McElrath III (McElrath or Charging Party) on July 27, 2016, and November 30, 2016, respectively, the Regional Director for Region 20 of the National Labor Relations Board (Board) issued a complaint and notice of hearing on December 29, 2016, and an amended complaint and notice of hearing on March 10, 2017 (the amended complaint). The General Counsel alleges that Respondent Uber

[4] The specific reference to the "National Labor Relations Board" in the savings clause here distinguishes this case from *Cedars-Sinai Medical Center*, 368 NLRB No. 83 (2019), where the Board found that the respondent violated Sec. 8(a)(1) by maintaining an arbitration agreement that encompassed federal statutory claims while excluding claims that were "preempted by federal labor laws." Id., slip op. at 2–3. The Board found it unlikely that an objectively reasonable employee would be familiar with the legal doctrine of preemption, let alone what actions and claims were preempted by federal labor laws, and therefore concluded that the clause was legally insufficient. Id., slip op. at 3. As a result, the Board found that the arbitration agreement restricted employee access to the Board and that such a restriction could not be supported by any legitimate business justification as a matter of law. Id. Here, unlike in *Cedars-Sinai*, the Agreement makes clear that employees may bring claims before the National Labor Relations Board specifically.

Member Emanuel did not participate in *Cedars-Sinai* and expresses no opinion on whether the arbitration agreement in that case was lawful. Nevertheless, he agrees with his colleagues that the present case is distinguishable from *Cedars-Sinai*.

Technologies, Inc. (Uber or Respondent) has been violating Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. sec. 151, et. seq. (the Act), by maintaining and enforcing an arbitration policy labeled as its "Dispute Resolution Agreement."

As discussed infra, following the issuance of the original complaint, certain portions of this case were stayed by the General Counsel pending an expected ruling from the United States Supreme Court. The parties also agreed to submit the non-stayed portion of the case to me based on a stipulated record, thereby waiving a hearing pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. Accordingly, based upon the entire record herein, including the stipulated facts and exhibits, and after considering post-hearing briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

JURISDICTION

At all times material herein, Respondent, a Delaware corporation with places of business nationwide, including a facility located in San Francisco, California, has been engaged in the operation of a smartphone application. During the 12-month period immediately preceding the issuance of the complaint, Respondent, in the normal course and conduct of its above-described business operations, purchased and received at its San Francisco facility products, goods, and materials in excess of $50,000 directly from points outside the State of California. The parties have stipulated and I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

PROCEDURAL BACKGROUND[1]

The original complaint alleged that Respondent's maintenance and enforcement of its Dispute Resolution Agreement (Agreement) violates Section 8(a)(1) of the Act based on two theories. First, it is alleged that the Agreement is facially unlawful because it requires employees to waive their right to pursue employment-related claims through class or collective action. Second, it is alleged that the Agreement violates the Act because employees would reasonably understand it to prohibit them from filing unfair labor practice charges and/or otherwise access the Board.

On March 10, 2017, the General Counsel stayed proceeding to hearing the facial challenge allegations, pending an expected ruling from the United States Supreme Court in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), cert. granted 137 S.Ct. 809 (2017). The parties then stipulated that the sole issue before me is whether the Agreement violates Section 8(a)(1) because employees would reasonably believe that it would prohibit them from filing Board charges.[2] On April 6, 2017, Respondent, Charging Party and the General Counsel filed a joint motion to waive a hearing on this issue and submit it to me for a recommended decision based on a stipulated record. On April 7, 2017, I granted the parties' joint motion and approved a stipulated record limited to: the parties' joint motion, stipulation of issues presented, stipulation of facts and stipulated joint exhibits.

ALLEGED UNFAIR LABOR PRACTICES

As noted, the sole issue before me is whether the DRA violates Section 8(a)(1) of the Act, because employees would reasonably believe that it interferes with their ability to file a Board charge.

A. Stipulated Facts

Since January 29, 2016, Respondent has required its software engineers[3] to execute the Agreement as a condition of their employment. The Agreement provides, in relevant part:

> **How This Agreement Applies:** This Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. This Agreement applies to any dispute arising out of or related to Employee's employment with Uber Technologies, Inc. or one of its affiliates, successor, subsidiaries or parent companies ("Company") or termination of employment and survives after the employment relationship terminates. Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Agreement, but not as to the enforceability, revocability or validity of the Agreement or any portion of the Agreement, including the Class Action Waiver described below.
>
> Except where this Agreement otherwise provides, this Agreement also applies, without limitation, to disputes regarding the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act (except for claims for employee benefits under any benefit plan sponsored by the Company and covered by the Employee Retirement Income Security Act of 1974 or funded by Insurance), and state statutes, if any, addressing the

[1] Abbreviations used in this decision are as follows: "Stip. ¶ __" for the parties' stipulation of facts; "Jt. Exh. __" for Joint Exhibit; "GC Br. at __" for the General Counsel's post-hearing brief; and "R. Br. at __" for Respondent's posthearing brief.

[2] Based on the pleadings, it appears that the General Counsel has withdrawn the non-stayed portion of its allegation that Respondent violated the Act by filing a motion to compel arbitration. See Jt. Exh. H at ¶ 5 (alleging violation based on maintenance, but not enforcement of, the Agreement).

[3] While the amended complaint alleges a violation based on Respondent's maintenance of its arbitration policy with respect to its "employees," the stipulated record establishes only that the Agreement binds individuals, such as Charging Party, employed by Respondent as software engineers. As such, any complaint allegation regarding application of the Agreement to non-software engineers fails for lack of proof.

> same or similar subject matters, and all other federal and state statutory and common law claims to the extent permitted by law.
>
> Regardless of any other terms of this Agreement, claims may be brought before and remedies awarded by an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), the National Labor Relations Board (www.nlrb.gov), or the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp).
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> * * *
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> **3. Class Action Waiver:** You and the Company agreed to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative basis. There will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action, or as a member in any purported class, collective, representative or private attorney general proceeding, including without limitation pending but not certified class actions ("Class Action Waiver").
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> * * *
>
> Although an Employee will not be retaliated against, disciplined or threatened with discipline as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representative action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver, Collective Action Waiver and Private Attorney General Waiver under the Federal Arbitration Act and seek dismissal of such class, collective or representative actions or claims.

(Stip. ¶ 10; Jt. Exh. M). The Agreement does not contain a procedure whereby employees may opt out of arbitration.

B. The Legal Standard

"[A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004) (citing *Lafayette Park Hotel*, 326 NLRB 824, 825–827 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999)).[4] "Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." *Lafayette Park Hotel*, 326 NLRB at 825 (footnote omitted).

The test for 8(a)(1) violations is not subjective, but objective: whether the policy or rule in question "would reasonably have a tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights . . . ." See generally *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001); see also *Whole Foods Market*, 363 NLRB No. 87, slip op. at 2 (2015) (citation omitted), affd. -- Fed. Appx. --, 2017 WL 2374843 (2d Cir. 2017). The Board gives rules a "reasonable reading"; it does not presume interference with Section 7 rights or read phrases in isolation. *Lutheran Heritage*, 343 NLRB at 646; *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 517 (D.C. Cir. 2007).

That said, the Board will construe ambiguous language against the employer as the promulgator of the rule. *Hyundai America Shipping Agency*, 357 NLRB 860, 862 (2011) (employees "should not have to decide at their own peril what information is not lawfully subject to such a prohibition"); see also *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3 fn. 11 (ambiguous rule can chill employees' Section 7 protected activities by creating "a cautious approach" to protected conduct based on fear of retaliation). Furthermore, "the Board must recognize that 'rank-and-file employees . . . cannot be expected to have the same expertise to examine company rules from a legal standpoint.'" *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 1 (2016) (quoting *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 5 (2015)).

By its *D.R. Horton*[5] and *Murphy Oil USA, Inc.*[6] decisions, the Board has applied these principles to policies requiring employee arbitration of disputes arising out of their employment. Specifically, where an employer maintains a broadly worded policy requiring employees to arbitrate all disputes arising out of their employment, the Board has found a violation Section 8(a)(1), "because employees would reasonably construe it to prohibit filing Board charges or otherwise accessing the Board's processes." *Dish Network, LLC*, 365 NLRB No. 47, slip op. at 2–3 (2017) (finding violation based on arbitration policy applicable to "any claim, controversy and/or dispute between them, arising out of and/or in any way related to [e]mployee's application for employment, employment and/or termination of employment, whenever and wherever brought") (citing *U-Haul Co. of California*, 347 NLRB 375, supra at 377–378) (finding violation based on policy requiring arbitration of "all disputes relating to or arising out of an employee's employment. . . [including] claims. . . recognized by . . . federal law or regulations")).

Filing unfair labor practice charges with the Board "is a vital employee right designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7." *Mesker Door, Inc.*, 357 NLRB 591, 596 (2011). Moreover, because the Board does not initiate its own proceedings, implementation of the Act is critically dependent on individuals filing charges on their own (and their coworkers') behalf. As such, employees' "complete freedom" to access to the Board's processes is a fundamental purpose of the Act and must be vigorously safeguarded. *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (citations

[4] Section 7 of the Act states that employees have the right to engage in certain rights, or refrain from them. Those rights include the right:

> . . . to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.

[5] 357 NLRB 2277, 2280 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013).

[6] 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), cert. granted 137 S.Ct. 809 U.S. (2017).

omitted); see also *ISS Facility Services, Inc.*, 363 NLRB No. 160, slip op. at 4 (2016); *SolarCity*, 363 NLRB No. 83, slip op. at 4.

C. Respondent's Arbitration Policy Violates the Act

Applying the above principles to the instant case, I find that employees would reasonably understand the Agreement to interfere with their ability to file a Board charge. Specifically, I find that the Agreement is ambiguous when read as a whole from the perspective of an employee attempting to discern whether, by signing it, he is waiving that right. Essentially, the Agreement plays "cat-and-mouse" with the reasonable employee-reader by referencing filing Board charges and accessing the Board without asserting, in plain and understandable language, that the Agreement does not impede on these critical Section 7 rights. *SolarCity Corp.*, 363 NLRB No. 83, supra at 5 (rejecting arbitration policy where, "absent language more clearly informing employees about the precise nature of the rights supposedly preserved, the rule remains vague and likely to leave employees unwilling to risk violating the rule by exercising Section 7 rights").

As noted, supra, the Board has cautioned against the use of vague and unexplained language in agreements purporting to govern employees' access to the Board. This case presents a classic example of legal jargon that is too clever by half; I find that, as drafted, the Agreement would lead a reasonable employee to question his Section 7 rights and, worse still, restrain him from exercising them out of fear that doing so would run afoul of the Agreement. In particular, I find that a reasonable employee, having read the Agreement, would likely conclude as follows:

> I am required to arbitrate any employment-related dispute I have with Uber on an individual—not collective—basis, except where the Agreement "otherwise provides," but the document is far from clear from what, exactly it otherwise provides.
>
> one sentence in the Agreement (¶ 2, second sentence) suggests that "applicable law" might permit my "access" to the Board, but another (¶ 2, first sentence) seems to say that Uber might be "permitted by law" to use the Agreement to bar me from filing "claims" with federal agencies such as the Board.
>
> if Uber wanted me to understand how the Agreement affected my rights, it would have simply said something like, "nothing in this Agreement prohibits you from filing Board charges," period.
>
> while Uber says it won't retaliate against me for exercising my Section 7 right to file a "class, collective or representative action," doing so would appear to violate the Agreement itself, which I signed as a condition of my employment.
>
> even if it doesn't result in retaliation, filing a Board charge would very likely be a waste of my time, because Uber can lawfully seek dismissal of my claims.

There is no question that an enforcement regime wholly dependent on the initiative of individual employees to file charges cannot be sustained under these conditions. See *ISS Facility Services, Inc.*, 363 NLRB No. 160, supra; *Ralph's Grocery Co.*, 363 NLRB No. 128, supra; *SolarCity*, 363 NLRB No. 83, supra; *Murphy Oil*, 361 NLRB 774, supra; *D. R. Horton,* 357 NLRB at 2278, supra; *U-Haul Co. of California,* 347 NLRB 375, supra.

In its defense, Respondent argues that the Agreement effectively carves out through "clear and unambigious language," employees' "right to file a charge with and seek remedies from" the Board. But, as noted above, the language Respondent relies upon is anything but clear:

> Regardless of any other terms of this Agreement, claims may be brought before and remedies awarded by an administrative agency *if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate.* Such administrative claims include without limitation claims or charges brought before. . .the National Labor Relations Board (www.nlrb.gov). . .

(emphasis added). This language echoes similar "savings clause" language the Board has in recent years found insufficient to clarify, for a reasonable employee, that the agreement in question did not prohibit the filing of Board charges. See *ISS Facility Services, Inc.*, 363 NLRB No. 160 (2016), and *SolarCity*, 363 NLRB No. 83 (2015). I find no meaningful distinction between the language in those cases and the instant one; the fatal flaw in each policy is the attempt to "save" a layman's rights by conditioning them upon his ability to interpret "applicable law." As the Board stated in the *ISS Facility Services* case:

> "[r]ank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint." *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994). As a result, the Board routinely has found insufficient language in workplace rules purporting to except, or "save," employees' legal rights from restrictions on their conduct. See *SolarCity Corp*., 363 NLRB No. 83, slip op. at 5 and fn. 18 (and cases cited therein) (2015). This is so even where such exceptions referred to the "NLRA" or "the National Labor Relations Act." See id. at 5 and fn. 19 (and cases cited therein). "The rationale underlying these decisions is that, absent language more clearly informing employees about the precise nature of the rights supposedly preserved, the rule remains vague and likely to leave employees unwilling to risk violating the rule by exercising Section 7 rights." Id. at 5.

363 NLRB No. 160, slip op. at 3 (2016).

Respondent by its posthearing brief makes no mention of the *SolarCity* or *ISS Facility Services* cases, but nonetheless suggests that certain aspects of its policy (present in neither of those cases) cure any chill caused by its vague and confusing language. First, Respondent argues, its Agreement specifically "guides employees to the NLRB's website (www.nlrb.gov) should they wish to file charges." I disagree. Merely referencing the agency's website does nothing to resolve the Agreement's ambiguity on the critical issue of employee access to the Board's processes. Considering the placement of the web address within the Agreement, I believe a reasonable employee would understand the reference to be, at best, a suggestion that visiting the site might help him figure out what Respondent was refusing to tell him outright: whether, despite signing the Agreement, he could access the Board to protect his Section 7 rights.

Second, Respondent argues that the Agreement should be considered lawful because it explicitly contemplates that, should

"applicable law" allow, employees will be allowed to pursue both Board charges *and any accompanying remedies.* This is truly a distinction without a difference; as set forth above, the Agreement fails based on its flawed savings clause. Explicating that employees may seek administrative remedies, conditioned upon the same unlawful clause, adds nothing to the equation.

Finally, Respondent claims that its anti-retaliation language reforms the Agreement. I disagree. As a preliminary matter, this language on its face extends protection from retaliation only to those who file group or collective charges, leaving the reader to ponder what repercussions might befall an individual charge filer. Secondly, immediately after reading this language, the employee is informed in no uncertain terms that filing charges would be futile in any event, because Respondent may "lawfully" enforce the Agreement to seek dismissal of any claim he files. This effectively nullifies whatever limited comfort the anti-retaliation might provide. See *Ralph's Grocery Co.*, supra, slip op. at 2–3 (arbitration policy could be reasonably read to suggest that the right to file charges with Board is futile; although the policy contains an NLRB exclusion, language in same paragraph dictates that disputes must nonetheless be resolved through arbitration per the policy).

As set forth above, considering the Agreement as a whole, I find that it is not written in a manner reasonably calculated to assure employees that their right, central to the Act's enforcement scheme, to file Board charges remains unaffected. Accordingly, I find that the Agreement violates Section 8(a)(1) because employees would reasonably believe that it interferes with this right.

CONCLUSIONS OF LAW

1. Respondent Uber Technologies, Inc. (Respondent) has at all material times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by maintaining a mutual arbitration agreement that employees would reasonably believe bars or restricts them from filing unfair labor practice charges with the National Labor Relations Board.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, I find that it should be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent should be ordered to rescind or revise its dispute resolution agreement as it applies to its employee-software engineers and to notify such employees that it has done so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Uber Technologies, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a dispute resolution agreement that employees would reasonably believe bars or restricts them from filing unfair labor practice charges with the NLRB.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the dispute resolution agreement in all of its forms, or revise it in all of its forms to make clear to employees that it does not bar or restrict them from filing charges with the NLRB.

(b) Notify all current and former employee-software engineers who were required to sign or otherwise become bound to the dispute resolution agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix" at all of its facilities where the dispute resolution agreement has been maintained with respect to Respondent's employee-software engineers, including, but not limited to, its San Francisco, California, Seattle, Washington and New York, New York locations.[8] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or has closed or ceased doing business at a facility covered by this order, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at those facilities at any time since January 29, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

It is further ordered that the Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 13, 2017

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain a mandatory arbitration policy covering our employee-software engineers that they would reasonably believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Dispute Resolution Agreement in all of its forms, or revise it in all of its forms, to make clear that it does not bar or restrict our employee-software engineers' right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employee-software engineers who were required to sign or otherwise become bound to the Dispute Resolution Agreement in any form that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

UBER TECHNOLOGIES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-181146 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.